UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

SOLOMON WILLIAMS, et al.,

Plaintiffs,

v.

THE BOEING COMPANY, et al.

Defendants.

No. C98-761P

ORDER GRANTING DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT

This matter comes before the Court on Defendants' Motion for Partial Summary Judgment. (Dkt. No. 772). Having reviewed the pleadings and supporting materials, the Court GRANTS Defendants' motion and DISMISSES Plaintiffs' 42 U.S.C. § 1981 claim of discrimination in compensation for salaried employees based on acts or conduct prior to June 11, 2000. Plaintiffs Second Amended Complaint is the first time they allege a claim for racial discrimination in compensation for salaried employees. As such, the four-year statute of limitations for § 1981 claims applies and any claims relating to conduct or actions prior to June 11, 2000 (four years before the Second Amended Complaint was filed) are time-barred. Contrary to Plaintiffs' assertion, Boeing is not judicially estopped from seeking summary judgment on this issue by virtue of the Consent Decree. The Consent Decree was directed at rectifying discrimination in promotions, retaliation, and a hostile work environment; it was not directed at discrimination in compensation of salaried employees.

Likewise, Plaintiffs' compensation claim does not relate back under Fed. R. Civ. P. 15(c) to Plaintiffs' original or First Amended Complaint. Plaintiffs did not allege facts in those complaints that Boeing discriminated in terms of compensation. The compensation claim does not arise out of the same operative facts as the promotions, retaliation, and hostile work environment claims that Plaintiffs alleged in their original and First Amended Complaints.

BACKGROUND

Plaintiffs filed a Complaint against Boeing on June 4, 1998, alleging racial discrimination in promotions, training, retaliation, and a hostile work environment. (Dkt. No. 1) They filed a First Amended Complaint on November 4, 1998, alleging these same forms of racial discrimination (the amended complaint added additional named representatives and Defendants). (Dkt. No. 93).

In August, 1999, Plaintiffs served Boeing a discovery request with interrogatories and requests for production of documents. Boeing responded in September, 1999, asserting general and specific objections to many of the requests for production.

Plaintiffs did not file a motion to compel. Any emerging discovery disputes were cut short because later in September, 1999, the parties entered a Consent Decree. Judge Coughenour approved the Consent Decree. In 2003, the Ninth Circuit reversed on fairness grounds and remanded. Stanton v. Boeing Co., 327 F.3d 938 (9th Cir. 2003).

On June 11, 2004, Plaintiffs filed a Second Amended Complaint, alleging racial discrimination in compensation for salaried employees, overtime for hourly employees, as well as promotions, retaliation, and a hostile work environment. (Dkt. No. 651).

Boeing moves for partial summary judgment, seeking dismissal of Plaintiffs' 42 U.S.C. § 1981 claim of discrimination in compensation for salaried employees based on acts or conduct prior to June 11, 2000. Boeing contends that this claim for acts before June 11, 2000 is barred by the four-year statute of limitations and that this claim does not relate back to Plaintiffs' original or First Amended Complaints.

ANALYSIS

Summary judgment is not warranted if a material issue of fact exists for trial. Warren v. City of Carlsbad, 58 F.3d 439, 441 (9th Cir. 1995), cert. denied, 516 U.S. 1171 (1996). The underlying facts are viewed in the light most favorable to the party opposing the motion. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986). "Summary judgment will not lie if . . . the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). The party moving for summary judgment has the burden to show initially the absence of a genuine issue concerning any material fact. Adickes v. S.H. Kress & Co., 398 U.S. 144, 159 (1970). However, once the moving party has met its initial burden, the burden shifts to the nonmoving party to establish the existence of an issue of fact regarding an element essential to that party's case, and on which that party will bear the burden of proof at trial. Celotex Corp. v. Catrett, 477 U.S. 317, 323-24 (1986). To discharge this burden, the nonmoving party cannot rely on its pleadings, but instead must have evidence showing that there is a genuine issue for trial. Id. at 324. Additionally, "at the summary judgment stage the judge's function is not . . . to weigh the evidence . . . but to determine whether there is a genuine issue for trial." Liberty Lobby, 477 U.S. at 249.

The statute of limitations for actions under 42 U.S.C. § 1981 is four years. 28 U.S.C. § 1658(a). Plaintiffs' Second Amended Complaint alleging racial discrimination in compensation of salaried employees was filed June 11, 2004. Therefore, Plaintiffs' salary compensation claim can extend to events only as far back as June 11, 2000. Plaintiffs argue that salary compensation claim can include actions or conduct going as far back as June, 1994 because: 1) Boeing is judicially estopped from arguing that Plaintiffs failed to allege the salary compensation claim earlier, and 2) Plaintiffs' salary compensation claim relates back under Rule 15(c) to their original complaint filed in 1998. Neither argument is persuasive.

I. Judicial Estoppel

Plaintiffs assert that Boeing should be judicially estopped from arguing that Plaintiffs did not allege salary discrimination in 1998 on the grounds that Boeing acknowledged in the Consent Decree that Plaintiffs had alleged salary discrimination and then sought and obtained (temporarily) court approval of that Consent Decree. Boeing counters that it consistently took the position until Plaintiffs filed their Second Amended Complaint that Plaintiffs' claims were limited to the promotion, retaliation, and hostile work environment claim, and that the Consent Decree merely contained a standard broad release of all possible and related claims of discrimination, but that nothing in the injunctive or monetary relief portions of the Consent Decree addressed any salary discrimination claims specifically.

A party is judicially estopped from asserting a certain position if that party previously and successfully asserted the contrary position. This is especially true when doing so would prejudice the opposing party. New Hampshire v. Maine, 532 U.S. 742, 749 (2001). The purpose of the doctrine is to "protect the integrity of the judicial process." Id. (quotation and citation omitted). Application of the doctrine is appropriate when: 1) the party's current position is "clearly inconsistent" with its earlier position, 2) the party was successful in persuading a court to accept its earlier position, and 3) the party would obtain an unfair advantage or impose an unfair detriment on the opposing party if not estopped. Id. at 750-51. The court may consider additional facts specific to the factual context at hand.

The "Litigation Background" section of the Consent Decree stated that:

> The Plaintiffs in the Alleged Class Action contend that Boeing has engaged in a policy or pattern or practice of unlawful Discrimination . . . in respect to promotions within the hourly ranks, promotions from hourly positions into managerial and other salaried positions, promotions among salaried positions, training, education, skills and career development, performance appraisals, transfers, compensation, discharge, discipline and other terms, benefits and conditions of employment.

(Berman Decl., Ex. 7 at 6). Plaintiffs point to this language and the fact that the district court approved the Consent Decree and argue that Boeing successfully represented to the Court that

Plaintiffs had alleged the salary compensation claim, which is "clearly inconsistent" with the position Boeing is asserting in the instant motion. Boeing counters that it never attempted to persuade the Court that Plaintiffs had alleged a salary compensation claim and that the reference to it in the Consent Decree is "merely . . . a laundry list of possible claims." (Defs' Reply at 6).

Despite the fact that the above-quoted Consent Decree language refers to a compensation claim alleged by Plaintiffs, the Court is not persuaded that this language alone judicially estops Boeing. The Consent Decree released Boeing from any and all claims, "known or unknown" by class members "which arise out of or are related to . . . any conduct . . . allegedly constituting Race Discrimination under Title VII . . . ." (Berman Decl., Ex. 7 at 12). As such, the Consent Decree included a broad release of all possible racial discrimination claims, whether pled in the complaint or not. It is standard practice for a party to attempt to protect itself from all possible related claims both pled and not pled as a condition for settling. More telling in this instance is the fact that the injunctive and equitable relief portion of the Consent Decree specifically referred to training and information regarding promotions and prevention of racial harassment, but made no reference to compensation. (Id. at 16-25). Likewise, the monetary relief portion set out a "point system" for allocating funds, which specifically referred to promotions, but made no reference to compensation. (Id. at 25-30). The questionnaire on the claim form, which class members were to fill out to receive a portion of the monetary damages, asked about the class member's experiences regarding promotions, racial harassment, and retaliation, but did not ask about compensation. (Id, Ex. B to Consent Decree).

In light of the absence of any relief regarding compensation, Boeing's current position that Plaintiffs never asserted a salary compensation claim until they filed their Second Amended Complaint is not "clearly inconsistent" with the position Boeing took in the Consent Decree. In sum, nothing in the Consent Decree judicially estops Boeing from obtaining partial summary judgment on the salary compensation claim.

II. Relation Back Under Rule 15(c)

Rule 15(c) provides that an amendment to a pleading relates back to the date of the original pleading when "the claim . . . asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading." Rule 15(c)(2). In determining whether a new claim relates back under this provision, the court should consider "whether the original and amended pleadings share a common core of operative facts so that the adverse party has fair notice of the transaction, occurrence, or conduct called into question." Martell v. Trilogy Limited, 872 F.2d 322, 325 (9th Cir. 1989). One indication that the new claim that arises out of the same operative facts is if the plaintiff will rely on the same evidence to prove the new claim that will be used to prove the originally pled claim. Percy v. San Francisco Gen. Hosp., 841 F.2d 975, 978 (9th Cir. 1988). Because Rule 15(c) is "intimately connected with the policy of the statute of limitations," the rule requires that the defendant have notice of the particular set of facts on which the new claim is based. Id. at 979 (citing the Rule 15 Advisory Committee Notes to the 1966 Amendment). In sum, the relevant factors in determining relation back are: 1) whether the new claim is based on the same operative facts as the claims in the original complaint, 2) whether the new claim will be proven by the same evidence as the original claims, and 3) whether the defendant had notice of the facts that form the basis of the new claim.

A. Same Operative Facts and Same Evidence to Prove New Claim

The facts supporting Plaintiffs' claim for discrimination in salary compensation will likely focus on a statistical comparison of African-American employees' salaries and their white counterparts' salaries, as well as the criteria used in setting salaries. In contrast, the facts supporting Plaintiffs' claim for discrimination in promotions will likely focus on a statistical comparison of the number of promotions that African-Americans applied for and received (or were qualified for but did not receive) and those of their white counterparts, as well as the selection criteria for awarding

promotions. Not only are the core operative facts different, but the evidence that Plaintiffs will rely on to prove the salary compensation claim will be different.[1]

Additionally, Plaintiffs' Second Amended Complaint contains factual assertions to support the salary compensation claim that were not asserted in the original or First Amended Complaints. Neither the original Complaint nor the First Amended Complaint ever specifically alleged discrimination in compensation for salaried employees or any facts showing discrimination in compensation. The mere fact that the named representatives included salaried employees does not establish that they alleged discrimination in compensation. The factual allegations relating to these individual salaried employees specifically refer to discrimination in promotions and a hostile work environment, but do not refer to discrimination in compensation. (Compl., ¶¶ 53, 59, 61; First Am. Compl., ¶¶ 75, 80, 82, 87-88, 94, 96-98). The general factual allegations in both complaints specifically refer to discrimination in promotions, training necessary to compete for promotions, retaliation, and a hostile work environment. (Compl., ¶¶ 39-42, 47; First Am. Compl., ¶¶ 58-61, 66, 68). The only explicit reference to compensation or pay is in one paragraph: "Senior management at Boeing/defendant employers is well aware that there is a company-wide pattern and practice of racial discrimination in promotion, pay and other areas." (Compl., ¶ 43; First Am. Compl., ¶ 62). In contrast, the Second Amended Complaint alleges many facts that specifically and explicitly relate to the salary compensation claim. (Second Am. Compl., ¶¶ 58, 60, 63-64, 71-72, 76, 78-79, 81).

The comparison of the factual assertions in the original and First Amended Complaints with the Second Amended Complaints highlights that fact that the compensation claim does not arise out of the same operative facts as the promotions, training, retaliation, or hostile work environment claims.

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[1] This is true even if other evidence that Plaintiffs will rely on, such as Boeing's internal studies regarding adverse impacts on minority employees regarding compensation, promotions, and other criteria, is the same for both the salary compensation claim and the promotions claim.

B. Notice of the Facts That Are the Basis of the Salary Compensation Claim

As highlighted above, the numerous factual allegations in the original and First Amended Complaints are squarely directed at discrimination in promotions, training, retaliation, and a hostile work environment. This, plus the absence of any factual assertions relating to compensation, especially in the paragraphs detailing the discrimination suffered by the salaried named representatives belies any notion that one passing general reference to discrimination in pay is sufficient to have put Boeing on notice that facts relating to compensation of salaried employees would be at issue. Any alleged discrimination in compensation of salaried employees cannot be said to have been brought to Boeing's attention by the allegations in the original or First Amended Complaints.

Plaintiffs point to more vague language in the original and First Amended Complaints to argue that their allegations were broad enough to have encompassed the salary compensation discrimination claim, and that Boeing was therefore on notice that salary compensation would be at issue. The original and First Amended Complaints both repeatedly referred to Boeing having subjected African-Americans to "different terms and conditions of employment" or "different treatment on the basis of their race." (Compl., ¶¶ 27, 47, 66, 71; First Am. Compl., ¶¶ 46, 49, 68).[2] However, in describing the "Nature of the Case" and the "Class Allegations" in the original and First Amended Complaints, Plaintiffs specifically referred to racial discrimination in promotions, retaliation, and a hostile work environment, but did not refer anywhere to pay or compensation. (Compl., ¶¶ 2-4, 27, 30; First Am. Compl., ¶¶ 2-4, 46, 49). The only exception is a reference in the "Nature of the Case" section in the First Amended Complaint, which states that "plaintiffs are qualified persons who have been denied the opportunity for promotion and pay increases, who have been subjected to a hostile work environment, and/or have been retaliated against . . . ." (First Am. Compl., ¶ 2). In this context, it is

[2] Similarly, the factual assertions for the individual representative salaried employees allege that Boeing subjected them to "different conditions of employment." (Compl., ¶¶ 53, 59, 61; First Am. Compl. ¶¶ 75, 80, 82, 87-88, 94, 96-98)

more reasonable to interpret "pay increases" as increases that would have accompanied promotions, not as equality of pay with white employees.

Given the specificity of the promotions, retaliation, and hostile work environment claims throughout the complaints, this single ambiguous reference together with repeated references to discrimination in "terms and conditions of employment" cannot be said to have put Boeing on notice that Plaintiffs were also alleging discrimination in salary compensation. See Barcume v. City of Flint, 819 F. Supp. 631, 637-38 (E.D. Mich. 1993) (court held that new claims of sexual harassment and disparate treatment did not relate back to claims of discrimination in hiring, promotions, and other "terms and conditions of employment" because the new claims were based on different facts and there was no notice to defendant that the "terms and conditions of employment" claim was for any violation other than those explicitly alleged in the original complaint). Plaintiffs have not pointed to any case where such language was sufficient to permit a new claim of discrimination to relate back. To hold otherwise would be to imply that alleging discrimination in the "terms and conditions" of employment is sufficient to put the employer on notice that every aspect of employment relating to the plaintiffs is potentially at issue; it would relieve the plaintiffs of having to specify at the outset what type of discrimination they allegedly suffered. Further, it would permit relation back of all possible employment claims and would thereby undermine the policy interests that statute of limitations further and upon which the relation back doctrine rests.

Plaintiffs assert that their initial discovery requests (before the parties entered the Consent Decree) provided Boeing with notice that they intended to challenge Boeing's practices with respect to compensation for salaried employees. Plaintiffs requested production of documents relating to the number of salaried employees, describing how salaries were determined, and any studies or reports analyzing compensation of African-Americans (in addition to studies or reports analyzing promotions or terminations of African-Americans). (Berman Decl., Ex. 4, Request Nos. 6, 19, 25). Boeing objected to the requests on the grounds that they were overly broad and that, because the requests

were for confidential information, Boeing would not produce the requested documents until a protective order could be entered. In response to the request to produce studies or reports, Boeing stated that there were no non-privileged documents that were responsive to this request.[3] (See Ex. 4 at 8:12-19, 10:9-16, Request Nos. 3, 6, 18, 19, 25). Regardless of whether Boeing's objections were specific enough, requesting information about compensation of salaried employees cannot be said to have created a salary compensation claim when it was not alleged in the complaint.

Lastly, Plaintiffs argue that Boeing acknowledged in the Consent Decree that Plaintiffs had alleged discrimination in compensation for salaried employees. This argument is similar to that in the judicial estoppel section. As discussed above, while the "Litigation Background" section of the Consent Decree did include compensation as one of Plaintiffs' claims in addition to the promotions and training claims, the relief awarded in the Consent Decree focused on promotions, retaliation, and hostile work place. Further, this same sentence refers to claims for discrimination in discharge and discipline, neither of which is purportedly alleged in the original or First Amended Complaints. Given this, together with Boeing's attempt to protect itself through this Consent Decree by insulating itself from any future race discrimination claims, even ones not plead by Plaintiffs, this reference to compensation did not put Boeing on notice that Plaintiffs had alleged in their original or First Amended Complaint discrimination in compensation.

CONCLUSION

The Court GRANTS Defendants' Motion for Partial Summary Judgment and DISMISSES Plaintiffs' 42 U.S.C. § 1981 claim of discrimination in compensation for salaried employees based on acts or conduct prior to June 11, 2000. The four-year statute of limitations for § 1981 claims bars any claims relating to conduct or actions prior to June 11, 2000 because Plaintiffs' Second Amended

[3] Plaintiffs further argue that Boeing's PAT study was responsive and that Boeing failed to include it on Boeing's privilege log. Whether this is true or not, it is not relevant to whether Boeing had notice through Plaintiffs' discovery requests that Plaintiffs were alleging discrimination in compensation of salaried employees.

Complaint, filed on June 11, 2004, is the first time Plaintiffs allege a claim for racial discrimination in compensation for salaried employees. Plaintiffs' compensation claim does not relate back under Rule 15(c) to Plaintiffs' original or First Amended Complaint. Likewise, the principle of judicial estoppel does not require a different result.

The clerk is directed to provide copies of this order to all counsel of record.

Dated: January 10, 2005

/s/ Marsha J. Pechman
Marsha J. Pechman
United States District Judge